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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1415

HERMAN ROSS,
Petitioner,

vs.

WILLIAM R. TAIT,
Mason Contractor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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INDEX

	Page
Citation of Opinions Below	1
Jurisdiction	1
Question Presented for Review	2
Constitutional Provision Involved	2
Statement of the Case	2-11
Reasons for Granting the Writ	11-13
Conclusion	13
Appendix A — Order of Michigan Supreme Court	14-15
Appendix B — Opinion of Michigan Court of Appeals	15-17

CITATIONS

CASES

Adler v. Nelson, 123 Misc. Rep. 531, 205 N.Y.S. 336 (1924)	12
Hamilton v. Alabama, 376 U.S. 650 (1964) reversing 275 Ala. 574, 156 So. 2d 926 (1963)	11
In re Millar's Estate, 185 Kan. 510, 345 P.2d 1033 (1959)	11-12
People v. Giacomino, 347 Ill. 523, 180 N.E. 437 (1932)	12
Podlasky v. Price, ... Cal. App. ....., 196 P.2d 608 (1948)	12

CONSTITUTION

United States:	
Fourteenth Amendment	2, 3, 11, 13

IN THE SUPREME COURT OF THE UNITED STATES

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No. _____

HERMAN ROSS,
Petitioner,

vs.

WILLIAM R. TAIT,
Mason Contractor,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Herman Ross, Petitioner, prays that a Writ of Certiorari issue to review the order of the Supreme Court of the State of Michigan entered in the above entitled cause on February 1, 1972.

CITATION OF OPINIONS BELOW

The original order of the Michigan Supreme Court dated February 1, 1972, is not reported to date and is attached as Appendix A hereto. The Opinion of the Michigan Court of Appeals dated November 24, 1971, affirming the judgment of the trial Court is reported at 37 Mich. App. 205 and is attached hereto as Appendix B.

JURISDICTION

The order of the Michigan Supreme Court was entered on February 1, 1972. This Court's jurisdiction is invoked under 28 USC 1257 (3).

QUESTION PRESENTED FOR REVIEW

1. Did the trial Court deny Petitioner a fair and impartial trial, thereby depriving him of property without due process of law, by its repeated demonstrations of hostility to Petitioner and his witnesses and his lawyer and his cause, and its disparagement of same and by its constant argumentative and hostile interruptions in examination of witnesses questioned?

CONSTITUTIONAL PROVISION INVOLVED

The applicable Constitutional provision involved provides in material part as follows:

> "AMENDMENT XIV Sec 1 . . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

This is a civil action initially brought by William R. Tait against Herman Ross in the Circuit Court for the County of Wayne, State of Michigan. The case centered around a dispute over the terms of an oral modification of a written contract for masonry work on an apartment project in the City of Southgate, Michigan. The trial in this matter was conducted by the Honorable Neal Fitzgerald sitting without a jury. On June 19, 1970, Judge Fitzgerald awarded Judgment in favor of William Tait against Herman Ross for Eight Thousand, Seven Hundred Forty-seven and 00/100 ($8,747.00) Dollars, plus costs and interest.

The trial was replete with repeated demonstrations of hostility to Mr. Ross, his witnesses, his attorney, and his case. The record clearly reflects that the trial court denied Mr. Ross a fair and impartial trial by its repeated and continuous argumentative demeanor toward Mr. Ross, his lawyer, and his witnesses and by the trial Court's restric-

tion, on its own motion, on the examination of witnesses favorable to Mr. Ross.

Moreover, the trial Court repeatedly took over the examination and cross-examination of witnesses and adopted a sarcastic demeanor towards Mr. Ross and witnesses favorable to Mr. Ross' case. What occurred in the trial Court was a sham and mockery parading under the name of a trial rather than a fair and impartial hearing as guaranteed to Mr. Ross by Amendment 14 to the United States Constitution.

Some examples supporting this conclusion are as follows: (Underscoring in all quoted portions of the Transcript is *added*).

The court and defense counsel, Mr. Fineman, engaged in the following colloquy while the court interrupted the examination of defendant, Herman Ross, to do its own examination:

> "The Court: Why did you make it 10 when they said it was 12½?
>
> A. Because they were; once again your Honor, trying to be compromising on the situation. They came out and said it was approximately —
>
> The Court: Why did they compromise if you brought them out? They were working for you. They are not compromising?
>
> A. Well, —
>
> Mr. Fineman: Your Honor, — Mr. Ross, maybe I can —
>
> The Court: *Now wait just a minute! You let me conduct this examination!*
>
> Mr. Fineman: Excuse me, your Honor." (Transcript pp. 195-196)

The following colloquy occurred during the cross-examination of defendant, Ross, by plaintiff's counsel, Mr. DeBiasi:

> "Q. Would you have copies of them, in the event there were other agreements?
>
> A. I will go back to my file and look.

The Court: *Well, you ought to know without doing that. Don't you know?*

A. Your Honor, I have not gone to the file. I presume that the file —

The Court: *Do you mean that you have been preparing for this case and you haven't even looked in your file to see what written contracts you have, nor has your lawyer shown them to you?*

A. Not on this, that I could tell you.

The Court: All right. Show him the contracts he has got, if he has got any? You must have them?

Mr. Fineman: Your Honor, I have gone through the file.

The Court: And there are none?

Mr. Fineman: There are none.

The Court: *Okay. Well, how come he doesn't know that? Didn't he even talk to you about it before the case started?*

Mr. Fineman: Well, to my knowledge, —

The Court: *It is the supreme ignorance that I have heard on this stand in a long time. People normally come in with a prepared case. If you don't even know what written contracts you have, I don't know how the case was ever prepared.*

Mr. Fineman: *I believe that what Mr. Ross has said was that —*

The Court: *That he didn't know. And if he didn't know, you undoubtedly didn't ask him, and he got no answer from you.*" (Transcript pp. 207-208)

During the cross-examination of defendant, Ross, by Mr. DeBiasi the following colloquy occurred:

"Q. That would be sometime after 1967?

A. When was the job completed?

Q. Well, this is your project, Mr. Ross. I assume you —

The Court: *You said October of '66. Now I don't know whether you meant it or not. That is what you said.*

A. *Honestly, your Honor, I don't recall when the project was completed.*

The Court: *You only said it about two minutes ago. I don't know how you could have foregotten it so fast.*" (Transcript p. 212)

During the cross-examination of defendant, Ross, by Mr. DeBiasi the following colloquy occurred:

"The Court: What did you do, — just guess they were under the ground?

A. Yes. That was then substantiated at a later date.

The Court: *Why didn't you say you were guessing at it? You said, we "found"?*

A. We did, sir.

The Court: *You stated it as a flat statement —*

A. We did, sir. We found it at a later date.

The Court: *What proof have you got that they are underground? You have never looked for them. You have never dug for them. You don't know.*

A. We have, sir. That is the point I am trying to make." (Transcript p. 254)

During the cross-examination of defendant, Ross, by Mr. DeBiasi the following exchange took place between the court and defendant, Ross:

"The Court: *You have made some pretty wild statements in other portions of your testimony, but I want to know how you know, — not what you —*

A. I did not, sir, — I did not; yes, I did not excavate and lift up the sod on 25 acres.

The Court: All right. Then you don't know?

A. No, I don't.

The Court: *All right. Then why don't you say so instead of making statements the other way?- All right, now go ahead. Confine your testimony to fact rather than guesses, and estimates, and hopes, and whatever else you have in mind.*" (Transcript p. 257)

During the cross-examination of defendant, Ross, by Mr. DeBiasi the following colloquy occurred:

"Q. Now, let's discuss the question of block

shortage. You indicated a wastage of one per cent. How did you arrive at this figure, Mr. Ross?

A. I called Borin Block and Supply, one of the largest suppliers of block in the country; and I asked them what the average shortage would be on any particular job as to block. This is the figure I got from them. I didn't carry it any further. As I say, it was impossible to count block because they are buried inside the walls.

Q. So again, this is not based upon any knowledge of yours?

A. I did not count the block. No.

Q. You are testifying as to what somebody else told you?

A. An expert in the field in my opinion. Yes.

Q. *Who from Borin? Give me a name?*

A. Well, try *Bill Borin.*

Q. Now, who told you there was a one per cent —

A. I said, *Bill Borin.* Okay?

Q. Bill Borin?

A. Bill Borin. That is spelled W-i-l-l-i-a-m, — William.

Q. *What is the spelling again, Mr. Ross?*

A. *Okay. If you want to play games, we will play them.*

The Court: *You will answer the questions or I will put you in contempt. Now do you hear that? Any you will go to jail. Now make up your mind, and don't be such a smarty!*

A. *I am trying not to, your Honor. He is asking smart questions.*

The Court: *All right. I am not going to try very hard not to keep you out of there. I will tell you that. Now answer the questions, and never mind the smart cracks. I will put you in there so fast it will make your head swim."* (Transcript pp. 263-264)

During the cross-examination of defense witness, Winter, by Mr. DeBiasi, the following exchange occurred:

"Q. He counted the bricks?

A. *He and I counted the bricks. Yes.*

Q. The statement says that he counted the bricks; I would imagine, grammatically referring to Mr. Stark. It doesn't say "I counted the bricks"?

A. I counted the bricks.

The Court: *Why didn't you put it in the paper if you counted them?*

A. *It should have had "he and I" in it.*

Q. (By Mr. DeBiasi): Then that affidavit is incorrect?

A. That is right, as far as that goes.

The Court: *Do you sign anything they put in your hands?*

A. I am not a lawyer, Judge.

The Court: *Do you read things before you sign them when you swear to them?*

A. Usually, yes. Yes.

The Court: *Do you know what it is to swear to something?*

A. Usually I do, yes.

The Court: *Well, how come you have signed your name to something that isn't true then, or something that isn't correct, in this instance?*

A. Because I didn't know that would be omitted.

The Court: *In other words, you sign anything they put in front of your face and say "sign it", is that it?*

A. No, I wouldn't.

The Court: Well, you did apparently. You say now "we" counted them, and there you say "he" counted them." (Transcript pp. 391-392)

During the cross-examination of defense witness, Winter (the Superintendent of defendant, Ross), by Mr. DeBiasi, the following colloquy occurred:

"The Court: *You seem to know remarkably little for the superintendent. They have been crabbing about some of the other employees around here. Did they ever threaten to fire you by any chance because you didn't know what was going on?*

A. This was signed by another man, your Honor.

The Court: You signed a few of them?

A. Yes.

The Court: *A lot of them, and you don't seem to know anything about any of them; — just what somebody told you, and you forgot to ask the details.*" (Transcript p. 407)

During the examination of defense witness, Winter, by Mr. Fineman, the following colloquy occurred:

"Q. Mr. Winter, on these invoices and orders where we have been talking about putting up facer boards, — there are slips here for more than an hour, three or four hours, — does that mean that it was one facer board or one door wall that was being done?

The Court: How does he know? He wasn't there. He hasn't any idea about it. He has repeated that three or four times. All he knows is what is on those slips of paper. *That is absolutely all he knows. Anything else* he says he is just guessing at; or somebody told him, *but he doesn't hesitate to repeat it. And he will say anything you want him to say if you just ask him. It doesn't make much difference what it says, because he apparently doesn't read them anyway.*" (Transcript p. 410)

During the examination of defense witness, Stark, the following exchange occurred:

"The Court (continuing): — in neither case?

A. Well, like I said, if I counted the wall, he come up and counted behind me, and he came up with the same count I did, or close to it. If there was a discrepancy we would go back and count over it.

The Court: All right, very good. You were hired to count, and he was apparently hired to count, but neither one of you counted independently. I would like to know the figures you actually arrived at in each case. *But you made it look good, whatever you agreed on. After this if you are going to come to court and you are hired to do something, you do it yourself. You don't do it with anybody else. You don't compute. You don't guess. You don't do anything else.*

You do what you are hired to do if you are going to sign an affidavit. Do you understand it?

(No audible response from the witness)

The Court: *I can't believe either one of them now.*" (Transcript p. 429)

During the cross-examination of defendant's brother, Wallace Ross, by Mr. DeBiasi, the following exchange took place:

"A. He was in charge of the carpenters. By the same token, sir, when you would have some work, and let's say you would send the electrician out to do a job where it would take an hour or an hour and a-half, they would always round it out. They would attempt to round it out, where he would say, — well, we will charge you 2 hours for it.

The Court: Is that an attempt to round out, or is that an attempt to cheat?

A. No.

The Court: *To "round out" makes a nice easy expression, I understand; but I would call that cheating, I think. Is that part of the business? Does that go on? Are you all like that?*

A. No, not everybody is like that, sir.

The Court: *Well, how many? You intimated that that was generally done?*

A. Well, they never split the hour and a-half, or an hour and fifteen minutes.

The Court: If it was being paid by the hour, they didn't split the hour?

A. No.

The Court: Why not?

A. *For the simple reason it would take him time to come to and from the building, and the builder would have to pay for it.*

The Court: *Well, I know, but they can bring that down to an exact time if they want to, and they are entitled to be paid for exactly how much they do, aren't they; not by what they hope to get?*

A. They never do, sir. It was always round hours.

The Court: *The public is the one that gets it in the neck. I can see that.*" (Transcript pp. 492-493)

During the cross-examination of Wallace Ross by Mr. DeBiasi, the following exchange occurred:

"The Court: *But who decides what the size of the backcharge is, is my question in essence?*

A. The foreman who sends the men out to do the various jobs.

The Court: *And he is padding his head off too, I suppose, like everybody else?*

A. I suppose, sir.

The Court: *Oh, all right. Then your testimony is hardly credible, any of you. Go ahead. But it is nice to know that you admit that everybody in the business pads their charges. I have often suspected that, but I have never had anybody admit it under oath before; and that doesn't exclude your outfit either.*" (Transcript pp. 494-495)

During the cross-examination of Wallace Ross by Mr. DeBiasi, the following colloquy occurred:

"The Court: All right. Then why didn't you stop him instead of talking backcharge to somebody you knew *couldn't make an agreement to backcharge or accept a backcharge if he had it, — if there was one due. You make more nonsensical statements than any witness I have listened to in a long long time. I think you would say "yes" to anything if you thought it would help.*" (Transcript p. 503)

During the cross-examination of Wallace Ross by Mr. DeBiasi, the following exchange occurred:

"Q. (By Mr. DeBiasi): Let me make it a little easier for you, Mr. Ross. What would be the instance of them using concrete on this job?

A. They wouldn't use concrete on that job.

The Court. *Well, how did the concrete get down the chimney then?*

A. When I said "concrete", your Honor, I meant brick and mortar. *You usually refer to concrete.*

The Court: *Boy, you are fast on your feet. You are fast on your feet."* (Transcript p. 509)

The federal question presented to this Court was first raised in the Michigan Court of Appeals in the Supplementary Brief of Appellant Herman Ross. The Michigan Court of Appeals affirmed the trial Court's order by Opinion dated November 24, 1971. (See Appendix A).

Mr. Ross sought leave to appeal the order of the Michigan Court of Appeals to the Michigan Supreme Court. Leave to Appeal was denied by the Michigan Supreme Court on February 1, 1972. (See Appendix B).

REASONS FOR GRANTING THE WRIT

This case presents a question of significance to the system of jurisprudence of this country. The vast majority of trials in this country are conducted by judges sitting without juries. The parameters of proper behaviour for a trial judge sitting without a jury must be delineated if litigants are to be provided a fair and impartial trial as guaranteed them by the 14th Amendment.

This court recently reversed a contempt conviction where the demeanor of the Court was improper. *Hamilton v. Alabama,* 376 U.S. 650 (1964). In the *Hamilton* case, the trial judge insisted on calling an adult woman by her first name in asking her questions and the woman refused to answer unless properly addressed. In reversing her conviction this court reversed the Supreme Court of Alabama, the opinion of which court is set forth at 275 Ala. 574, 156 SO.2d 926 (1963).

Much other authority agrees that the parties in litigation are entitled to a fair and impartial trial, even though a jury trial be waived.

For instance, the Kansas Supreme Court has stated that:

"It is clear that a court must be fair and impartial when the court is trying a fact case without a jury."

In re Millar's Estate, 185 Kan. 510, 345 P.2d 1033 (1959)

The Illinois Supreme Court has spoken as follows:

"Counsel for defendants claim that the judge displayed hostility toward the witnesses, subjected them to severe cross-examination, plainly indicated he did not credit their testimony, and was determined to bring out evidence to convict defendants. Where a cause is tried before a jury the trial judge must not indulge in extensive questioning or indicate by his conduct either favor or disfavor towards parties or witnesses. In *People v. Bernstein,* 256 Ill. 63, 95 N.E. 50, this court said that the examination of witnesses is the more appropriate function of counsel, and that instances are rare and conditions are exceptional which will justify the presiding judge in conducting an extensive examination. The *Bernstein* case was tried before a jury while a jury was waived in this cause. Nevertheless, the principle enunciated in the former case is not to be ignored even when a jury has been waived. In either event it is the duty of the judge to arrive at his conclusions from a calm, unbiased consideration of the facts. He should neither be prosecutor nor defender. While he is a searcher for the truth, it is not his duty to discomfit and confuse witnesses by his questions or attitude."

People v. Giacomino, 347 Ill. 523, 180 N.E. 437 (1932)

In the case of *Adler v. Nelson,* 123 Misc. Rep. 531, 205 N.Y.S. 336 (1924), the Supreme Court of New York reversed a trial, held by the court without a jury, because the words of the trial court constituted a reflection upon defense counsel. (It should also be noted that at the time the words were spoken, the court was considering a request of defense counsel, and that it *ultimately granted the request.*)

In the case of *Podlasky v. Price,* ..... Cal. App. ....., 196 P.2d 608 (1948), the California Court of Appeals reversed the decision of the lower court, sitting without a jury, because the trial judge "at various stages of the trial made

statements calculated to intimidate the litigants and their counsel and to confuse the witnesses". (at 616)

The Transcript in this case is littered with statements, questions and comments of the trial court which were intimidating, argumentative, prejudicial, unfair and hostile. In many instances the trial judge completely took over the cross-examination of defendant or his witnesses.

The dispensation of justice in this country is not limited to jury trials. It applies to nonjury trials as well. Defendant is entitled to a new trial.

This Court should review this case in order to delineate the standards of proper behavior for a trial judge sitting without a jury to insure that litigants in such cases are provided with fair and impartial trials as guaranteed them by the 14th Amendment.

CONCLUSION AND RELIEF REQUESTED

Petitioner believes that this case involves a significant question relative to the administration of justice in this country. For that reason and for those previously stated, Petitioner prays that this Court issue a Writ of Certiorari in order to review the decisions of the Michigan Supreme Court and the Michigan Court of Appeals which Petitioner believes are erroneous.

Respectfully submitted,

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APPENDIX A — ORDER OF MICHIGAN SUPREME COURT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 1st day of February in the year of our Lord one thousand nine hundred and seventy-two.

Present the Honorable:

Thomas M. Kavanagh,
Chief Justice,
Eugene F. Black,
Paul L. Adams,
Thomas E. Brennan,
Thomas G. Kavanagh,
John B. Swainson,
G. Mennen Williams,
Associate Justices.

WILLIAM R. TAIT, Mason Contractor,
Plaintiff-Appellee,

v.

53829

HERMAN ROSS,
Defendant-Appellant.

On order of the Court, the application for leave to appeal is considered, and the same is hereby DENIED, for the reasons that defendant and appellant has failed to persuade the Court that he has a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the fore-

going is a true and correct copy of an order entered in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 2nd day of February in the year of our Lord one thousand nine hundred and seventy-two.

(s) Harold Hoag
Deputy Clerk

APPENDIX B — OPINION OF MICHIGAN COURT OF APPEALS

STATE OF MICHIGAN

COURT OF APPEALS

DIVISION 1

WILLIAM R. TAIT, Mason Contractor,
Plaintiff-Appellee,

v.

Docket # 9864

HERMAN ROSS,
Defendant-Appellant.

BEFORE: Lesinski, C.J., Holbrook and Wade VanValkenburg, JJ.

Per Curiam

Defendant Herman Ross appeals as of right from a judgment of $8,747 plus costs and interest rendered in favor of plaintiff by a judge sitting as trier of fact.

This case centers around a dispute between plaintiff and defendant over the terms of an oral modification of a written contract for masonry work on an apartment project in the city of Southgate. Plaintiff contends the contract was for the number of bricks actually delivered to the job site. Defendant contends that the contract was for the number of bricks actually laid. The trial judge, after hearing five days of testimony, found for the plaintiff.

Defendant contends that the plaintiff failed to sustain his burden of proof by failing to prove how many bricks were actually laid. He further states that the trial judge's decision was against the weight of the evidence because "every bit of evidence in this case tends to support appellant's position that appellee installed less bricks than he billed for."

In finding for plaintiff we must assume the trial court felt that plaintiff's version of the contract was correct. Since plaintiff's interpretation of the contract was for "bricks delivered," it was unnecessary for him to prove that all the bricks delivered were installed. In *Lipcomb* v *Turnwood*, 24 Mich App 353 (1970), we stated that findings of fact by the trial court in a contract action will be reversed only when crucial proof has been overlooked or ignored. No proof has been overlooked in this case. There is ample evidence to support the trial judge in his determination of the contract. This Court will not substitute its judgment on factual questions in a nonjury case for that of the trial court unless the facts clearly indicate an opposite result should be reached. *Miller* v *State Highway*, ... Mich App ..... (1971), (released June 22, 1971, docket No. 9849).

Defendant also contends that the trial court denied him a fair and impartial trial by its repeated demonstration of hostility to defendant and his witnesses, lawyer and cause, and its disparagement of same, and by its constant argumentative and hostile interruptions in examination of witnesses. Examination of the record indicates that defendant was not denied a fair and impartial trial. While the trial judge, sitting as trier of fact, engaged in extensive questioning of witnesses, this alone has not been held to be error. *People* v *Wilder*, 383 Mich 122 (1970). The sub-

stance of the trial judge's questions and comments focused on what he considered was the lack of credibility in certain of defendant's witnesses and in defendant's own statements. In *Houghton* v *Collins*, 344 Mich 175, 180 (1955), a civil case heard by a judge sitting as trier of fact, the Michigan Supreme Court stated:

> "The partiality, prejudice and bias which appellant claims was shown by the trial judge on some occasions during the hearing, while indicative of the court's lack of belief in the merits of Coleman's claim, even if true, constitute no basis for reversal."

Whatever our personal views may or may not be on this type of practice by a trial judge sitting as trier of fact, our judicial function as an intermediate appellate court is limited. Where the Supreme Court has spoken, as here, we are not free to disregard its precedent.

Affirmed.